APPENDIX A

New Mexico Constitution, Art. II, Sec. 20:

> Private property shall not be taken or damaged for public use without just compensation.

New Mexico Constitution, Art. XVI, Sec. 1:

> All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

New Mexico Constitution, Art. XVI, Sec. 2:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

New Mexico Constitution, Art. XVI, Sec. 3:

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

New Mexico Statutes Annotated (1953 Comp.), Sec. 75-1-3:

> The United States, the state of New Mexico, or any person, firm, association or corporation, may exercise the right of eminent domain, to take and acquire land right of way for the construction, maintenance and operation of reservoirs, canals, ditches, flumes, aqueducts, pipelines or other works for the storage or conveyance of water for beneficial uses, including the right to enlarge existing structures, and to use the same in common with the former owner; any such right of way for canal, ditch, pipeline, or other means for the conveyance of water shall in all cases be so located as to do the least damage to private or public property

consistent with proper use and economical construction. Such land and right of way shall be acquired in the manner provided by law for the condemnation and taking of private property in the state of New Mexico for railroad, telegraph, telephone and other public uses and purposes. The engineers and surveyors of the United States, the state and of any person, firm or corporation shall have the right to enter upon the lands and waters of the state and of private persons and of private and public corporations, for the purpose of making hydrographic surveys and examinations and surveys necessary for selecting and locating suitable sites and routes for reservoirs, canals, pipelines and other water works, subject to responsibility for any damage done to such property in making such surveys.

New Mexico Statutes Annotated (1953 Comp.), Sec. 68-2-1:

Any five [5] persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipelines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith, for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of state, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with the state corporation commission.

New Mexico Statutes Annotated (1967 Supp.), Sec. 22-9-22:

The state of New Mexico or any agency or political subdivision thereof, including the state highway commission and any person, firm or corporation authorized by the Constitution or laws of this state to

exercise the right of eminent domain who has heretofore taken or damaged or who may hereafter take or damage any private property for public use without making just compensation therefor or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation thereof, shall be liable to the owner of such property, or any subsequent grantee thereof, for the value thereof or the damage thereto at the time such property is or was taken or damaged, with legal interest, to the date such just compensation shall be made, in an action to be brought under and governed by the Code of Civil Procedure of this state. Actions under this section shall be brought in the county where the land or any portion thereof is located.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

W. S. RANCH COMPANY, a New Mexico Corporation,
Plaintiff,
vs.
KAISER STEEL CORPORATION, a Nevada Corporation,
Defendant.

No. 6658. Civil

Memorandum Opinion

Defendant operates a coal mine in Colfax County, New Mexico and owns a water right in the Vermejo river which flows through plaintiff's ranch lands in the same county. Defendant has constructed on lands owned by plaintiff, but entirely on lands over which the Atchison, Topeka & Santa Fe Railway Company has an easement for operation of a railroad to defendant's mine, a water line together with two wells and a sump on the bank of the river. The railroad company has raised no objection to the water line and wells and at least tacitly has approved of such use of its right of way. Not so the plaintiff, who brings this action for an injunction and seeks ten thousand dollars compensatory damages and a million dollars punitive damages.

Defendant has filed a Motion to dismiss, contending plaintiff's sole remedy is an action to assess damages under the provisions of the New Mexico Inverse Condemnation Statute, Section 22-9-22, N.M.S.A. 1953 Comp. The Motion to dismiss must be sustained if the defendant is given the right of eminent domain. *Garver and Hillmeyer* v. *Public Service Company of New Mexico*, S.Ct. N.M., #7939, ... N.M. ....., Vol. 5 No. 25 Advance Opinions, December 15, 1966.

The defendant claims the right of eminent domain by reason of Sec. 75-1-3, N.M.S.A. 1953 Comp., which provides in relevant part as follows:

> "* * any person, firm, * or corporation, may exercise the right of eminent domain, to take and acquire land right-of-way for the construction, maintenance and operation of reservoirs, canals, ditches, flumes, aqueducts, pipe-lines or other works for the storage or conveyance of water for beneficial uses, * * * any such right-of-way for canal, ditch, pipeline, or other means for the conveyance of water shall in all cases be so located as to do the least damage to private or public property consistent with proper use and economical construction."

The plaintiff contends that this statute,

(1) has no application to the defendant under the facts of this case; or

(2) that insofar as it may be applicable to one in defendant's position, it is contrary to the provision of Article II, Section 20 of the New Mexico Constitution which provides:

> "Private property shall not be taken or damaged for public use without just compensation."

One preliminary question is whether that part of Section 75-1-3, supra, which authorizes condemnation of land for facilities "for the storage or conveyance of water" permits the installation of wells, sump and pumps or similar diversion systems.

In *Pueblo of Isleta* v. *Tondre and Pickard*, 18 N.M. 388; 137 Pac. 86, the Court permitted the exercise of eminent domain for "a new head-gate, together with a considerable length of ditch from the new point of diversion, * * *". The case was before the Court on another issue, and the ques-

tion of the head-gate being within the ambit of the statute was not discussed. In *Snow* v. *Abalos*, 18 N.M. 681, 140 Pac. 1044, the Court quotes with approval Kinney on Irrigation and Water Rights, (2d ed.) Sec. 707, as follows:

> " 'The appropriation of water consists in the taking or diversion of it from some natural stream * * and consummated * * by the actual application of * * the water to the use designed or to some other useful purpose.' "

The Court goes on to state:

> "Necessarily he must have some suitable ditch, or other device, to enable him to take the water from the stream. In other words, the water must be captured before it can be applied to a beneficial use."

This statute, 71-5-3, supra, is to be given a liberal construction. *State* v. *District Court*, 39 N.M. 523, 51 Pac. 2d 239. A statute must be so construed as not to defeat its purpose. *Fisherdick* v. *Board of Education*, 30 N.M. 454, 236 Pac. 743. The right to a reasonable diversion from a flowing stream would be included in the grant of the right for the storage or conveyance of water for beneficial uses. A more limited construction would defeat the purpose of the statute.

In contending that the statute is contrary to the New Mexico Constitution as applied to the facts of this case, the plaintiff cites *Threlkeld* v. *Third Judicial District Court*, 36 N.M. 350, 15 Pac. 2d 671, and *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co.*, 39 N.M. 344, 47 Pac. 2d 414. In *Threlkeld* the New Mexico Supreme Court declared unconstitutional a New Mexico Statute (now appearing as Sections 22-9-20 and 21, N.M.S.A. 1953 Comp.) purporting to give logging companies the right of eminent domain. The Court held that the power of eminent domain could not be granted to private lumbering interests to enable them

to get their own logs to market. In a similar vein was the holding in the *Gallup American* case, as applied to a coal mining company.

The defendant herein is likewise a coal company but we are here concerned with a different statute. The statute here involved, 75-1-3, supra, in effect declares the beneficial use of water to be a public use, and it has been so interpreted by the New Mexico Supreme Court. *Pueblo of Isleta* v. *Tondre,* supra, *Young* v. *Dugger,* 23 N.M. 613, 170 Pac. 61; *City of Albuquerque* v. *Garcia, et al.,* 17 N.M. 445, 130 Pac. 118. Plaintiff points out that in all these cases the ultimate use of the water was for irrigation or domestic purposes. But the statute places no such limit on the use of the water nor have the courts.

The New Mexico cases are replete with the observation that New Mexico is an arid state. It is in the public interest that the waters of the state, which are public, be applied to a beneficial use. The expressed policy of the New Mexico Legislature is that such application is a public use. That policy is not in violation of the New Mexico Constitution.

Prior to statehood the Territorial Supreme Court considered the statute authorizing companies for the purpose of constructing irrigation and other canals and granting to such companies the right of eminent domain. *Land and Irrigation Co.* v. *Gutierrez,* 10 N.M. 177, 61 Pac. 357.

The statute provided that the purposes for which such companies might be formed would include:

> "* * * the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and improvement of lands, in connection therewith;"

The Court held in part:

> "That lands condemned and used for the right of way of reservoirs, canals, ditches and pipe lines, for the purposes specified in the act above referred to, are for a public purpose, is too plain to require extended discussion."

In *Threlkeld* v. *Third Judicial District Court*, supra, the Court pointed out the difference between granting the power of eminent domain to a particular industry and granting it for the purpose of distributing the public waters of the state for beneficial use. It was said:

> "Nevertheless, we may indorse all that was said in Nash v. Clark, supra, regarding irrigation as a public use, without accepting the view of the majority in that case that 'enlightened public policy' is better represented by the 'line of decisions' which would impair the constitutional guaranty by accepting as a 'public use' anything thought to promote the public interest. We think that by incorporating in our Constitution the time-honored formula for the protection of private property, we adopted its generally recognized meaning.
>
> "However, we already had a policy, also time-honored, as to waters. We had nationalized them. Not as a source of public revenue, as minerals are retained for royalties; but as an elemental necessity, like air, which must not be allowed to fall under private control. Only by invoking the power of eminent domain can the state distribute its own waters as its public policy requires. A right of way taken for that purpose is in a large sense devoted to public use. This policy finds general and express recognition in the Constitution. It is impossible to suppose that any interpretation of 'public use' was intended to upset it."

It is the position of plaintiff that the particular ultimate use of the waters is determinative of whether or not

a public use is involved. This is not so. It is the distribution of the public waters of the State of New Mexico to a beneficial use which is the public purpose.

While the grant of eminent domain may be exercised either by the State, *State ex rel. Red River Valley Co.* v. *District Court*, 39 N.M. 523, 51 Pac. 2d 239, or by private persons and industry, *Young* v. *Dugger*, supra, the public use which is being furthered is the distribution of the public waters of the state without which an arid state cannot develop.

The Motion to dismiss is sustained.

This Memorandum Opinion will be filed as the Court's Conclusions of Law.

/s/ Howard Bratton
United States District Judge

United States Court of Appeals

TENTH CIRCUIT
SEPTEMBER 1967 TERM

W. S. RANCH COMPANY, a New Mexico Corporation,
Appellant,
vs.
KAISER STEEL CORPORATION, a Nevada Corporation,
Appellee.

No. 9295

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

A. K. Montgomery and Seth D. Montgomery (George W. Robertson, G. Gordon Robertson and Richard S. Morris with them on brief) for Appellant.

Paul A. Kastler and George T. Harris, Jr. for Appellee.

Before MURRAH, Chief Judge, BROWN* and HICKEY, Circuit Judges.

MURRAH, Chief Judge

This is an appeal from judgment of dismissal for failure to state a claim on which relief can be granted. The two-fold question, presented and decided on the pleadings, is whether the New Mexico statutes grant the right of eminent domain to a private corporation for the purpose of securing water to be used in coal mining operations, and, if so, whether inverse condemnation proceed-

*By Special Designation.

ings is the sole remedy available to one whose land is so taken.

Plaintiff-appellant W. S. Ranch Company filed its Complaint in the District Court of New Mexico alleging that it is the owner and possessor of certain land on and near the Vermejo River in New Mexico; that defendant-appellee Kaiser Steel Corporation wilfully and maliciously entered upon Ranch's lands, after notice that its right to enter was disputed, drilled diversion wells and laid a pipeline to divert water from the Vermejo River to its coal mining operations adjacent to Ranch's property; and that Ranch is entitled to an injunction against further trespass and compensatory and punitive damages. Claiming the right of eminent domain, Kaiser responded with a Motion to Dismiss the Complaint supported by an affidavit to the effect that Kaiser owns water rights approved by the New Mexico State Engineer to be used for "beneficial use" at its coal mine; that an approved place of diversion for such waters is on the Vermejo River and that the beneficial use of such waters necessitates conveying them by pipeline across Ranch's lands. Nowhere does Kaiser contend that it negotiated with Ranch for a right-of-way or that it instituted condemnation proceedings as prescribed by Sec. 22-9-1 through 22-9-21 N.M. Stat. Anno.

Kaiser claims its right to eminent domain under the following constitutional and statutory provisions:

Art. XVI, §2 N.M. Const.

> "The unappropriated water of every natural stream, perennial or torrential within the state of New Mexico is declared to belong to the public and to be subject to appropriation for beneficial use in accordance with the laws of the state. Priority of appropriation shall give the better right."

Art. XVI, §3 N.M. Const.

"Beneficial use shall be the basis, the measure and the limit of the right to use water."

§75-1-3, N.M. Stat. Anno., 1963 Comp.

"* * * any person, firm * * * or corporation, may exercise the right of eminent domain to take and acquire land right-of-way for the construction, maintenance and operation of * * * pipe lines or other works for the storage or conveyance of water for beneficial uses."

On Motion to Dismiss and here the Ranch Company argues that if, as Kaiser contends, §75-1-3 is construed to authorize the condemnation of private land to secure water in aid of mining operations, it must be declared unconstitutional as permitting the taking of private land for private use; that the statute can be accorded constitutional validity only if the "beneficial use" of water for which it authorizes eminent domain is determined by the ultimate or final use of the water, and that use inurs to the benefit of the public—not private industry. The effect of this argument is to suggest that even though the constitutional words "beneficial use" may be construed to mean any use whatsoever except waste, when that term involves the exercise of the power of eminent domain, it must necessarily be measured by "ultimate use" and limited to "public use".

Relying upon a number of New Mexico Supreme Court cases, Judge Bratton held that in an arid state such as New Mexico any "beneficial use" of water is a "public use", i.e. see Albuquerque Land and Irrigation Company v. Gutierrez, 61 Pac. 357; City of Albuquerque v. Garcia, 130 Pac. 118; Pueblo of Isleta v. Tondre, 137 Pac. 86; Young v. Dugger, 170 Pac. 61; State v. District Court of Fourth Judicial District, 51 P.2d 239; State v. Red River Valley Co., 182 P.2d 421; Threlkeld v. Third Judicial District Court,

15 P.2d 671. He agreed with Ranch that in each of the cited cases the New Mexico court was concerned only with the ultimate use of water for irrigation and other domestic purposes, concededly a "public purpose" in New Mexico. But, he thought it decisive that "the statute [75-1-3] places no such limit on the use of water, nor have the courts." He further reasoned that "While the grant of eminent domain may be exercised either by the State * * * or by private persons and industry * * * the public use which is being furthered is the *distribution* of the public waters of the state without which an arid state cannot develop"—not the *ultimate* use to which the water may be put after distribution. (Emphasis ours).

Undoubtedly, the decision in this case must necessarily have a far reaching effect. If the "beneficial use" of water is to be determined by the *distribution of water* among the people of New Mexico, as indeed the trial court held, then the "public benefit" must be rationalized in light of the well established fundamentals of eminent domain, for land will become subject to condemnation for purposes of diverting water to anyone whomsoever for any ultimate purpose whatsoever, public or private, save, of course, waste. On the other hand, if the "beneficial use" is to be determined by the *ultimate use* to which the water is put, then even though an individual or industry may secure a valid right to take water from the public sources, there can be no assurance of any means of diverting the water from its source to the place of use, and industry and growth of the state could be severely hampered. It is conceded that this precise question of industrial use of public waters has never been presented to the New Mexico courts. We must seek then to determine what that court will say when the question comes before it and to reconcile the law of eminent domain with

the peculiar body of water law developed from necessity in arid states.

Both Ranch and Kaiser rely upon the same New Mexico cases as did the trial court, each contending for a different interpretation. The case law is not decisive, but as we read the cases, the court in each instance scrutinized the specific or "ultimate" use to be made of the public water. An analysis of the crucial language in each case will illuminate our conclusion.

In 1900, prior to the enactment of 75-1-3, the New Mexico courts were already facing the question of condemnation of private land for purposes of diverting water from a public source to non-riparian lands. The court in Albuquerque Land and Irrigation Co. v. Gutierrez, supra, affirmed "that the legislature has power to enact a law granting the right of eminent domain * * * provided the property is for a *public purpose*" and "It is undoubtedly true that the diversion and distribution of water for *irrigation and other domestic purposes* in New Mexico and other western States where irrigation is necessary is a *public purpose.*" Id. 357 (Emphasis ours). Section 75-1-3 was enacted in 1907 and in 1913 the court first construed the statute stating, "The right *to condemn* lands *for irrigation ditches* was conferred upon 'the United States, the [State] of New Mexico, or any person, firm, association or corporation.'" See City of Albuquerque v. Garcia, supra. The court evidenced its concern for the constitutional question by citing and quoting the Utah case of Nash v. Clark, 75 Pac. 371, affd. 198 U.S. 361, to the effect that "In view of the physical and climatic conditions * * * and in light of the history of the arid West, which shows marvelous results accomplished by irrigation, to hold that the *use of water for irrigation* is not in any sense a public

use * * * would give to the term 'public use' altogether too strict an interpretation, and one we do not think is contemplated by the Constitution." (Emphasis ours)

Shortly thereafter in Pueblo of Isleta v. Tondre, supra, the New Mexico court held that the terms of 75-1-3 were broad enough to confer the right of condemnation for the *particular purpose of irrigation* upon persons holding valid water rights prior to enactment of the statute. The later case of Young v. Dugger, supra, presented again the sole question "whether the right of condemnation exists in favor of a private person *for the purpose* of conveying water for *irrigation purposes* over the land of another." Id. 61 (Emphasis ours). Relying on its previous decision in City of Albuquerque v. Garcia, supra, the court once more held that "use of water for irrigation purposes constitutes a public use."

In State v. District Court of Fourth Judicial District, supra, the State of New Mexico sought to condemn private land for the purpose of erecting a dam or reservoir for impounding the waters of the Canadian River. The court held that "The state may appropriate private property under its inherent power of eminent domain by legislative act * * *. Whether the *use to which the property is to be put* is a public use is a judicial question * * *. But the *character of use* here involved [irrigation] was long ago determined by the Supreme Court of the Territory to be a public use and never departed from by this court * * *".

Next came State v. Red River Valley Company, supra. The New Mexico court was concerned first with whether certain impounded waters were public waters and, if so, whether their use for recreational purposes would be a "beneficial use". The court noted that "The invitation to enjoy these recreational activities is urgently and con-

stantly extended by this and other states similarly situated, and millions of dollars are spent by tourists from less attractive areas who come to enjoy them." It went on to say that "We are asked to strike down the long-established rules pertaining to public water ownership and uses because we have not yet been called upon to apply it to this *particular beneficial use.* * * * We know of no reason why we should restrict the use of waters which belong to the public only to *the uses* which have *up to this time* been adjudicated by our Court as 'beneficial'." (Emphasis ours)

The water right cases were invoked in Threlkeld v. Third Judicial Dist. Court, 15 P.2d 671, 86 A.L.R. 547, in support of the asserted power of eminent domain under a statute authorizing a logging company to take private property for right-of-way purposes in accordance with the laws governing common carriers. Denying the right of eminent domain, the court went to the heart of the matter with the inquiry as to what ultimate use would be made of the right-of-way. Finding that the right-of-way was to be used in furtherance of logging operations, it concluded that such operations did not fit into the distinctive classification accorded uses of water for irrigation purposes, historically recognized as a public purpose out of "elemental necessity". Likening water to air which "must not be allowed to fall under private control", the court went on to use the language which Judge Bratton deemed significant and supportive to the effect that "Only by invoking the power of eminent domain can a state distribute its own waters as its public policy requires. A right-of-way taken for that purpose is in a large sense devoted to public use."

We are reluctant to disagree with a New Mexico trial judge interpreting New Mexico law, but nowhere in the cases examined can we find language to support the trial court's ruling that "the public use being furthered is the distribution of the waters * * *". On the contrary, our ap-

praisal of the language in each case leaves us with the inescapable impression that the court was looking to the ultimate use of the water to determine whether that use would inure to the benefit of the general public or only a few individuals. This is apparent in the Red River Valley case where the New Mexico court considered the general economic benefit to inure to the people of New Mexico from the particular use of its waters for recreational purposes. We think the language in that case leaves no doubt that the court deemed itself impelled to examine each proposed ultimate use of the public waters and determine whether that use was of sufficient public benefit as to justify eminent domain. This "ultimate use" concept is also manifest in the United States Supreme Court's affirmance of Nash v. Clark, supra, wherein it acknowledged that many factors have bearing upon "the question whether *the individual use* proposed might not in fact be a *public one.*" (Emphasis ours)

This brings us at last to our salient question whether the ultimate use of public waters in aid of coal mining is a "beneficial" or "public" use so as to confer upon Kaiser the power of eminent domain for a right-of-way to divert such water. We, of course, start with the proposition that private property can be taken only for public use and that the effect of the New Mexico decisional law is to carve out an exception to this constitutional mandate in recognition of overriding considerations born of necessity in an arid land where water is the life-blood of the community. Certainly the right of an individual to hold and enjoy property ought not be subjected to the carte blanche power of eminent domain simply because distribution of water "may promote the public interest and tend to develop the natural resources of the state." Clark v. Nash, supra. Each case must rest upon its own constitutional footing.

In some states "mining", like irrigation, is, to be sure, deemed to be public in character for the purposes of eminent domain. This is made so either by constitutional or statutory provision or court adjudication. See Inspiration Consol. Copper Co. v. New Keystone Copper Co., 144 Pac. 277, and cases collected there. And, this in no way violates the Federal Constitution. See Clark v. Nash, supra. But, the determination of what shall constitute a "public" use is a judicial question. See State v. District Court of Fourth Judicial District, supra. The mere fact that some states permit the taking of private property in aid of "mining" is not controlling here, for the New Mexico court in Gallup American Coal Co. v. Gallup Southwestern Coal Co., 47 P.2d 414, considering the precise industry of coal mining, rejected the public character of the industry with the observation that "As an essential or paramount industry, in its importance to the existence and functioning of the state and to the livelihood of the people [coal mining] does not seem to us to belong in a class with * * * irrigation in * * * New Mexico * * * . We consider it rather in a class with the timber or lumbering industry which was involved in the Threlkeld case. * * * It follows, that insofar as the statute impliedly declares a public use in the business or industry of coal mining, it is violative of the New Mexico Constitution, Article 2, §20." We think that case is controlling here. The court in Gallup was, to be sure, concerned with a statute other than 75-1-3. But, logic dictates that the New Mexico court would not deny the power of eminent domain in aid of coal mining under one statute, and sustain it under the statute invoked here merely because it speaks in terms of "beneficial use" of water.[1]

1. It is noteworthy that the particular type of taking is not disclosed in the Gallup opinion. For all we know the court might very well have been concerned with the taking of a right-of-way to divert water in aid of coal mining.

We hold that Kaiser had no power to take Ranch's land by eminent domain and that the Complaint stated a claim upon which relief could be granted. In this view of the case the question of inverse condemnation becomes academic. We will, however, comment to the extent that if Kaiser had followed the intricately detailed New Mexico statutory procedure for acquiring land by condemnation, the issues presented and decided here could have been litigated in an orderly manner in the courts of New Mexico where they belong.

The judgment is reversed and the case is remanded with directions to proceed in accordance with the views herein expressed.

United States Court of Appeals

TENTH CIRCUIT
SEPTEMBER 1967 TERM

W. S. RANCH COMPANY, a New Mexico Corporation,
Appellant,
vs.
KAISER STEEL CORPORATION, a Nevada Corporation,
Appellee.

No. 9295

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

A. K. Montgomery and Seth D. Montgomery (George W. Robertson, G. Gordon Robertson and Richard S. Morris with them on brief) for Appellant.

Paul A. Kastler and George T. Harris, Jr. for Appellee.

Before MURRAH, Chief Judge, BROWN* and HICKEY, Circuit Judges.

PER CURIAM:

The petition for rehearing is overruled. The motion to abstain pending determination of the declaratory action instituted by Appellee, Kaiser Steel Corporation on October 30, 1967, in the State District Court of Colfax County, New Mexico, is likewise denied.

BROWN, Circuit Judge, concurring and dissenting:

I concur with no reservations in the overruling of Kaiser's petition for rehearing. With like conviction I re-

*Of the Fifth Circuit, sitting by designation.

spectfully dissent from the denial of the motion to abstain pending State Court determination. This seeming contradiction perhaps deserves some elaboration.

First, on the correctness of the opinion constructed for the Court by the Chief Judge I have no misgivings. With the materials which we have—and which have been worked on, poured over, reworked, and reargued countless times in briefs, replys, rejoinders and motions—the conclusion reached certainly appears to be a permissible and probably the correct one. But that is not the equivalent of saying that the result announced here is what the Supreme Court of New Mexico would *now* declare. The *Erie*-lights are here dim, very dim. For all acknowledge that never before has the Supreme Court of New Mexico been invited to go down, find, locate, follow, or mark the path of the right of a private party to condemn private property over which to transport water to be used for mining purposes,[1] and if not dim, they shine both ways if not all ways.[2] But the Court is the first to recognize that although the controversy comes to us as an ordinary run of the mine private diversity suit, it is overcharged with the most fundamental of major public policies to New Mexico. Phrased with characteristic judicial understatement, the Court sounds this awareness at the outset of its analysis. "Undoubtedly," the Court states, "the decision in this case must necessarily have a far reaching effect." ..... F.2d ....., ... [No. 9295, 10 Cir., Oct. 12, 1967, at p. 5].

1. Thus the Court states: "It is conceded that this precise question of industrial use of public waters has never been presented to the New Mexico courts." —— F.2d ——, —— [No. 9295, 10 Cir., Oct. 12, 1967, at p. 5].

2. The opinion continues: "Both Ranch and Kaiser rely on the same New Mexico cases * * *, each contending for a different interpretation. The case law is not decisive * * *." —— F.2d ——, —— [No. 9295, 10 Cir., Oct. 12, 1967, at p. 5].

The stakes are high and the consequences portentous. Water, that vital natural resource, cuts a big figure in the economy, the official outlook of the state, and the jurisprudence of New Mexico. At least so far as federal constitutional aspects are concerned, the choice to be made is that for New Mexico alone. With the sketchy materials at hand, how can we say that it is the end use, the "ultimate use," that must confer the public benefit? And, even if there is really a choice between the alternatives phrased by the Court—a thing which I most earnestly doubt since the same problem is inherent in any effort to state it in terms of alternative or exclusionary categories—how are we to say that New Mexico declares that the use of water for irrigation will be "beneficial" to the public whereas the use of it as an indispensable requirement for the operation of an industrial enterprise would not be? True it is that if—as the Court holds—the public use is confined to the traditional one of irrigation in an arid country, there are less disturbing implications of a sociological, political, or economic nature. But Federal Judges—at least in these days—do not have the Keys to the Kingdom to determine for a sovereign state the internal domestic policies which it desires to follow.

In our modern complex economic structure, government—state and local—no longer confines its bounty to the traditional rural or agricultural objects. Nowadays there is open, frank recognition that business—yes, big business—is both legitimate, wholesome and very, very much desired. Thus we see state after state, city after city, operating within the limits of officially declared policy, seeking out industry beyond the borders of the state under aggressive programs of solicitation with the high hopes that some industrial enterprise can be persuaded to relocate within the pursuer's boundaries. The process in the typical legislative structure is something a good deal more

complex than simple, high-pressure salesmanship. Invariably it turns on state-authorized benefits, tax remissions, rental inducements and the like. And what is important here is that any such state-supported, state-authorized benefits inevitably fall upon members of the public and the cost is borne by property subject to taxation.

If—and the if today doesn't seem to be very great—property can fairly be taxed equitably and ratably to finance such economic inducements to business and industrial enterprise then it seems to me that subjecting private property to the prospect of condemnation at the hands of a private party is but a variation in the form of that burden. And probably, there is no burden at all since the taking requires just compensation.

From the standpoint of the economy of a city, a county, an area, or the whole state of New Mexico, a huge industrial enterprise such as the coal mining operation here involved may well be thought by the state to transcend either the value of the use of the water for traditional agricultural purposes[3] or the unsettling impact of a legislative policy allowing private parties under limited circumstances to exercise eminent domain over private property to transport water for use in further private activity.

With the stakes so high, the guiding materials so equivocal, the choice so wide open and the consequences one way or the other so devastating, what does good judicial administration suggest ought to be done? One thing it

3. Ultimate "private" use is a shibboleth. For it is conceded that a New Mexico farmer or rancher having water rights can exercise eminent domain to permit transportation of such water over intervening lands owned by others even though when finally on his land the waters will be used in the irrigation of crops or the raising of livestock on which he hopes to, and undoubtedly will, reap great profits in the private enterprise of a farmer.

suggests is that we ought not be doctrinaire either expressly or silently. Thus, *Meredith* v. *City of Winter Haven,* 1943, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9, is not, as so often supposed, an absolute that under every and all circumstances a federal court in a diversity case has to plow through without calling on the state tribunals for aid in the divination of serious and troublesome state problems. Too much has gone on—indeed too much water has gone over the dam—for any such reading to be compelled. Putting to one side *Thibodaux,*[4] in which the Court of Appeals was reversed for failure to abstain for state court determination in a diversity case, the Supreme Court's repeated use of the Florida *Clay* type certification procedure demonstrates that the policy reflected in *Winter Haven* is not a road block. It is simply one of the factors to be assayed. Starting with *Clay*[5] the Supreme Court not less than three times has exploited fully the Florida procedure.[6]

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4. Louisiana Power & Light Co. v. City of Thibodaux, 1959, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058. There, reversing the Fifth Circuit, the Court stated: "Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours." *Id.* at 30, 79 S.Ct. at 1073, 3 L.Ed. 2d at 1063.

See also Leiter Minerals, Inc., v. United States, 1957, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed. 2d 267: "[W]e think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation * * * and the United States may of course appear to urge its interpretation of the statute. *Id.* at 229, 77 S.Ct. at ____, 1 L.Ed. 2d at 275.

5. Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed. 2d 1170, on certification upon remand, Fla., 1961, 133 So. 2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F.2d 505, rev'd, 1964, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed. 2d 229.

6. In addition to *Clay*, the other two cases are Aldrich v. Aldrich, 1963, 375 U.S. 249, 84 S.Ct. 305, 11 L.Ed. 2d 304, and Dresner v. Tallahassee, 1963, 375 U.S. 136, 84 S.Ct. 235, 11 L.Ed. 2d 208. Useful as *Clay* certification is to the Supreme Court and

To me the sound approach continues to be the one reflected in the unreversed action of the Court in *Delaney*.[7] And experience since that time continues to bear out the strong note sounded by the concurring opinion[8] that real injustice is done to litigants and, worse, more damage is done to the states' jurisprudence and its policies by a headstrong, resolute, inflexible determination on the part of a federal court to barge ahead in a sort of ascetic, misguided *Winter Haven* impulse, than will likely result from the slight delay occasioned by invoking state adjudication of the controlling issues.[9] For the simple fact is that more and more,[10] more federal courts are being overruled by more state courts on local issues upon which such federal courts have undertaken to read the *Erie* signs in the quest of the *Winter Haven* grail.

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to the Fifth Circuit its use is reserved to important questions. Run-of-the-mine cases with little recurring public importance are routinely given the *Erie* treatment. See, e.g. Motor Vehicle Cas. Co. v. Atlantic Nat'l Ins. Co., 5 Cir., 1967, 374 F.2d 601; Greer v. Associated Indem. Corp., 5 Cir., 1967, 371 F.2d 29; Hamilton v. Maryland Cas. Co., 5 Cir., 1966, 368 F.2d 768.

7. United Services Life Ins. Co. v. Delaney, 5 Cir., 328 F.2d 483 (en banc), *cert. denied*, 1964, 377 U.S. 935, 84 S.Ct. 1335, 12 L.Ed. 2d 298, *on motion for rehearing* en banc, 358 F.2d 714, *cert. denied*, 1966, 385 U.S. 846, 87 S.Ct. 39, 17 L.Ed. 2d 77.

8. See United Services Life Ins. Co. v. Delaney, *supra*, 328 F.2d at 485 (concurring opinion). The *Delaney* abstention procedure and the justification for it sought to be articulated by the concurring opinion have come in for some spirited criticism. See Agata, Delaney, *Diversity, and Delay: Abstention or Abdication?*, 4 Houston L. Rev. 422 (1966) (Special Fifth Circuit Issue).

9. Subsequent *Delaney* judicial events in neither the Texas State Courts nor the Fifth Circuit (traced in note 5, Aetna Life Ins. Co. v. Barnes, 5 Cir., 1966, 361 F.2d 685, 687) prove that when employed with a little enlightened resourcefulness on the part of either counsel, trial court, or appellate court the *Delaney* abstention is unworkable or administratively unsound. It is safe to say that no one on the Fifth Circuit, majority or dissenting, entertained for the briefest fraction of a possible division of a moment the idea that on recourse to the state courts after remand either counsel or the Texas courts would suppose that the single critical issue be excised for a sort of law-school academic inquiry in the declaratory judgment proceeding.

10. In the score sheet which follows (notes 11, 12, 13 and 14 infra), I do not repeat the cases documented in *Delaney*.

Texas, for example, continues on its path of independence in a number of instances[11] not the least of which was the Fifth Circuit's *Delaney* prediction itself.[12] But, this is not an infirmity of the Fifth Circuit alone.[13] And the experience in Florida demonstrates that state court reversals of Federal appellate decisions occur both in appeals of state cases[14] and on *Clay* certification (see note 5 supra) to the Supreme Court of Florida, the latter with some spectacular results.[15] For that matter, this Court has seen

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11. See, *e.g.*, Felmont Oil Corp. v. Pan-American Pet. Corp., Tex. Civ. App., 1960, 334 S.W. 2d 449, error ref'd n.r.e., which expressly refuses to follow Sinclair Oil & Gas Co. v. Masterson, 5 Cir., 1959, 271 F. 2d 310; see E. Brown, Law of Oil & Gas Leases, 1958: 1966 Cumulative Supplement, p. 293; Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F. 2d 84, 102 n. 57.

12. Prof. Agata points this out. "Additionally and ironically, Judge Brown can now add *Delaney* to the list of wrong guesses. Concluding that 'judicial statesmanship of the highest and proper order' dictated permitting Texas courts to decide the legal issue, and noting that Texas 'has a judicial system which will permit adjudication with dispatch and speed' and 'with its full arsenal of procedural devices . . . will enable the parties to have a prompt and completely sufficient determination,' Judge Brown and his colleagues had again failed to anticipate the state court ruling. Texas refused to hear the case." (Citing Delaney v. United Services Life Ins. Co., Tex. Civ. App., 386 S.W. 2d 648, *aff'd*, Tex., 1965, 396 S.W. 2d 855). Agata, *supra* note 7, at 424.

13. See Yarrington v. Thornburg, Del., 1964, 205 A. 2d 1, *rejecting* Truitt v. Gaines, D. Del., 1961, 199 F. Supp. 143; Travelers Ins. Co. v. Auto Owners Ins. Co., 1964, 1 Ohio App. 2d 65, 203 N.E. 2d 846, *rejecting* American Fid. & Cas. Co. v. Indemnity Ins. Co. of North America, 6 Cir., 1962, 308 F.2d 697, Kelly v. State Auto Ass'n, 6 Cir., 1961, 288 F.2d 734, and Travelers Ins. Co. v. Ohio Farmers Indem. Co., 6 Cir., 1958, 262 F.2d 132.

14. Weed v. Bilbrey, Fla. Ct. App., 2d Dist., 1967, 201 So. 2d 771, rejecting outright Emerson v. Holloway Concrete Prods. Co., 5 Cir., 1960, 282 F.2d 271, 1961 AMC 1484, *cert. denied*, 1961, 364 U.S. 941, 81 S.Ct. 459, 5 L.Ed. 2d 372, 1961 AMC 1923, and expressly adopting the dissent of Brown, J., in the *Emerson* case, 282 F.2d at 278.

15. See, *e.g.*, Life Ins. Co. of Va. v. Shifflet, 5 Cir., 1966, 359 F.2d 501, upholding a jury verdict against the insurance company under the construction of the Florida Insurance Statutes on fraudulent misrepresentation. But then see, 5 Cir., 1967, 370 F.2d 555, granting a motion for rehearing and certifying the question to the Supreme Court of Florida, which in Life Ins. Co. of Va. v. Shifflet, Fla., 1967, 201 So. 2d 715, reached a result opposite from

and felt first hand the independence of one of its states over the strong protest that for a uniform oil lease clause in a routine contract dispute its declarations for Kansas would simply have to do for Oklahoma as well.[16]

Of course, having concurred in the opinion and in the denial of rehearing, I necessarily embrace without reservations the Chief Judge's statement that "we will, however, comment to the extent that if Kaiser had followed the intricately detailed New Mexico statutory procedure for acquiring land by condemnation, the issues presented and decided here could have been litigated in an orderly manner in the courts of New Mexico where they belong." ..... F. 2d ....., ... If we were not dealing with, indeed perhaps

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the one reached in the original Fifth Circuit opinion. On receipt of the answer to the certified question, the Fifth Circuit vacated the earlier judgment and remanded the case to the district court. See 380 F.2d 375.

And see especially Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F.2d 347, in which the Court certified to the Supreme Court of Florida the controlling question of the dollar limitation on damages for wrongful death, a problem presenting fundamental and serious questions of state policy with only fragmentary case materials with which to work.[5] The determination of the question was so difficult, not only for the Federal Court in the light of intervening developments in the law of conflicts but also for the Supreme Court of Florida, that it resulted actually in two opinions before the question was settled. See the opinion at 201 So. 2d 743, holding that the situs state dollar limitation was contrary to Florida policy and the opinion at 201 So. 2d 749, where, on rehearing, the Court reversed itself to validate the Illinois recovery limitation. No amount of prescience, including that thought by some to come from a Federal Commission, enables a non-Florida Judge authoritatively to determine Florida policy.

16. See Williams, *The Role of Federal Courts in Diversity Cases Involving Mineral Resources*, 13 Kan. L.Rev. 375, 383-4 (1965), discussing the sequel to Rogers v. Westhoma Oil Co., 10 Cir. (Kansas), 1961, 291 F.2d 726. Despite the issuance of mandamus and, through the voice of my Brother Breitenstein, the strong remonstrance against forum shopping—an ugly word which does not mask that very motive for resort to a Federal rather than local court in an *Erie* case—by this Court in Lutes v. United States District Court, 10 Cir., 306 F.2d 948, on motion for modification, 308 F.2d 574, *cert. denied*, 1962, 371 U.S. 941, 83 S.Ct. 320, 9 L.Ed. 2d 275, the Supreme Court of Oklahoma rejected the *Rogers* reading of the Pugh clause for Oklahoma. Rist v. Westhoma Oil Co., Okla., 1963, 385 P.2d 791.

coming dangerously close to trifling or meddling with serious matters of great public moment and importance to New Mexico, I would be quite willing to breathe some life into that remonstrance to say to Kaiser that having chosen this awkward device it must live with the consequences of a Federal Court diversity determination with all its perils, its pitfalls, and the possibilty of its being wrong. But the real peril of this decision is that the victim is in no real sense either party to the cause. The one suffering is the State and its carefully nurtured, domestically contrived public policy.[17] Similarly, the fact that the motion is now made after the adverse decision of this Court, while a powerful circumstance in many situations, does not prevent the exercise of abstention now in view of these great public stakes.[18]

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17. Indeed the Attorney General of New Mexico in the relation of the State Engineer in a motion to appear as amicus curiae in effect urges us on behalf of the State of New Mexico to abstain pending determination by its own Courts of Kaiser's declaratory judgment suit filed October 30, 1967. On behalf of New Mexico the highest law officer asserts its concern and contends that Kaiser, not the Ranch, is correct in the interpretation of this basic New Mexico law. The motion states:

> "(2) The state of New Mexico has a vital public concern in the Court's interpretation and construction of section 75-1-3, * * * in its opinion filed herein October 12, 1967, its interest arising out of the impact of that interpretation of New Mexico law upon the development and distribution of the public waters of the state.

It then asserts that the State of New Mexico takes this position on the merits:

> "(a) New Mexico law grants the power of eminent domain for the purpose of diverting and conveying water under a valid water right across the lands of others, for application to beneficial use, and the taking of private property for such purposes is a taking for 'public use' under the New Mexico law * * *."

18. It has often been granted by an appellate court, including the Supreme Court. See United Gas Pipe Line Co. v. Ideal Cement Co., 1962, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed. 2d 623, and numerous other cases. As a matter of fact, by formal memoranda to the District Court, copies of which have now been made available to us, Kaiser made a like motion in the event that Judge Bratton had doubts—which he did not—asking that he remand the parties to the state courts for appropriate declaratory relief.

We know one thing for a certainty: the New Mexico "law" on this point is not settled by this case. Denying one of these parties the chance to get a determination now by the only Court which can authoritatively speak brings about one of those curious aberrations of the law in which the only party ultimately hurt is the one who happens to lose the particular case since all others will soon be protected.[19] For the Supreme Court of New Mexico is sure to speak and I would predict that it will speak soon, although I do not know which way it will speak. But considering the difficulty, if not the impossibility of a private litigant securing effective relief from a now already overburdened United States Supreme Court or releasing this Court from the impact of this decision as a matter of stare decisis,[20] about the only virtue an immediate decision has is that it is done. It is done now and delay is avoided. Delay, to be sure, is a thing we all strive to avoid and overcome. But what else is served? Is there any virtue in decision now simply for the sake of decision if—and the if is a very big one—the public importance of the question is certain soon to drive other litigants to the New Mexico Courts where the outcome may well be quite different? But different or not, authoritative decision will be made for the first time.

In the look back—even in the eyes of the pedagogical purists—about the only virtue it will have is that someone

19. "Thus it is that the only person who is hurt is the one who has no effective recourse to correct the error. Cf. Tipton v. Socony Mobil Oil Co., 5th Cir., 1963, 315 F.2d 660, 662, 667, 1963 AMC 1800, 1803, 1809 (dissenting opinion), reversed per curiam, 1963, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed. 2d 4." United Services Life Ins. Co. v. Delaney, *supra*, at 487. (concurring opinion).

20. See Atlantis Dev. Corp. v. United States, 5 Cir., 1967, 379 F.2d 818, 828; see also Lincoln Nat'l Life Ins. Co. v. Roosth, 5 Cir., 1962, 306 F.2d 110 (en banc), *cert. denied*, 372 U.S. 912, 83 S.Ct. 726, 9 L.Ed. 2d 720.

did his duty in the *Winter Haven* sense.[21] In the meantime, of course, Kaiser and Ranch know their rights. But no one else, and certainly not New Mexico, knows. Nor will they until New Mexico speaks. Why not listen?

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

W. S. RANCH COMPANY, a corporation
Protestant-Appellant,
vs.
KAISER STEEL CORPORATION, a corporation, EUAL A. MESSICK, DAISY C. MESSICK, and S. E. REYNOLDS, State Engineer of New Mexico,
Applicants-Appellees.

No. 8368

APPEAL FROM THE DISTRICT COURT OF COLFAX COUNTY
McINTOSH, JUDGE

ROBERTSON & ROBERTSON, Raton, New Mexico; MONTGOMERY, FEDERICI & ANDREWS, RICHARD S. MORRIS, Santa Fe, New Mexico, Attorneys for Appellant.

JOHN F. RUSSELL, Roswell, New Mexico; *WRIGHT* & KASTLER, Raton, New Mexico, Attorneys for Appellee Kaiser Steel Corporation.

BOSTON E. WITT, Attorney General, F. HARLAN FLINT, PETER B. SHOENFELD, Special Assistant Attorneys General, Santa Fe, New Mexico, Attorneys for S. E. Reynolds, State Engineer of New Mexico.

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21. From the standpoint of judicial administration in a substantive sense the outcome brings to mind Judge Friendly's lamentations. "'The compulsion felt by my brothers * * * to reach what seems a palpably unjust result reminds me of Chief Justice Erle's observation as to the occasional predilection of the best of judges for "a strong decision," to wit, one "opposed to common sense and to common convenience." * * *.' Spanos v. Skouras Theatres Corp., 2 Cir., 1966, 364 F.2d 161, 167." Lawrence v. United States, 5 Cir., 1967, 378 F.2d 452, 467 n. 44.

The district court affirmed the state engineer's approval of Kaiser Steel's application to change the point of diversion of certain adjudicated water rights, and W. S. Ranch appeals.

Although there are other connected topics, the basic issue has to do with the meaning and effect to be given to the final decree which adjudicated the water rights of the Vermejo Stream System in 1941. Under the decree, the maximum duty of water of the 163.4 acres with which we are concerned was adjudged "to be two acre-feet of water per annum per acre of land irrigated delivered at the land." These particular rights were junior to other rights of W. S. Ranch, and the point of diversion was below that of W. S. Ranch. Kaiser purchased the rights to 115 of the 163.4 acres, and applied to the state engineer for authority to change the point of diversion to a location above that of W. S. Ranch. The application sought to divert 230 acre-feet annually at a point some fifteen miles higher up on the stream system, and, of course, to dry up 115 acres, or 230 acre-feet of water, at the old location. The proposed transfer was also from agricultural to industrial use, for mining and coal-washing facilities.

At the hearing before the state engineer, considerable testimony was presented as to the amount of water available, the manner in which Kaiser would utilize the water, and the amount of return flow to the stream system; but Kaiser offered no testimony as to the extent to which water had been applied to beneficial use on the 163.4 acres involved. What little testimony there is as to application or non-application of water to beneficial use was brought out on cross-examination of one of Kaiser's witnesses. It is W. S. Ranch's position that even though the adjudication decree provided that the maximum duty was two acre-feet,

that this does not justify the transfer of this amount of water without an affirmative showing that such maximum has been applied to beneficial use and that the transfer can be made without detriment to existing rights.

The state engineer found that the change of place of use, and the change in purpose and point of diversion, could be made "without detriment to existing rights." Such a finding is required by law (§§75-5-22 and 75-5-23, N.M.S.A. 1953), but the question here is: Does the adjudication decree take the place of proof of the amount of water actually applied to beneficial use by a junior appropriator? It is our considered judgment that the adjudication decree is proof of the nature and extent of the rights sought to be transferred. The adjudication court determined that the water had been applied to beneficial use, thus satisfying the constitutional and statutory requirements. The state engineer could not do else than accept the court's decree. Were it otherwise, the engineer could, in effect, overrule, amend or revise an adjudication decree. This, of course, would offend not only the constitution but our statutes and decisional law.

The purpose of adjudications under the New Mexico statutory procedure is well stated in Harkey v. Smith, 1926, 31 N.M. 521, 247 Pac. 550, wherein we said:

> ". . . A careful re-examination of this legislation convinces us that there has been a departure from the old arid region doctrine of appropriation and seasonal or periodical appropriation, and that not [sic] the right to use water, either as to *volume or periods of use*, is regulated either by the permit of the state engineer, or the decrees of the courts. It is, of course, true that 'beneficial use shall be the basis, the measure, and the limit of the right to the use of water,' as is provided by section 3 of article 16 of our Constitution. But this pro-

vision merely declares the basis of the right to the use of the water, and in no manner prohibits the regulation of the enjoyment of that right. This legislation provides in section 23 that when water rights are adjudicated, the court shall declare as to each party the *priority, amount, purpose, periods, and place of use,* and, in case of irrigation, the lands to which the water shall be appurtenant. : . .

"It thus appears that all of these serious questions, leading so often to vexatious and disastrous litigation in regard to the appropriation of waters, both as to quantity and time, have been eliminated by this legislation. *Now the right of the water user is measured by* the permit of the state engineer or *the decree of the court.* It is the nature of the grant which prevents all future controversy as to the extent an [sic] character of the right.

". . .

"But under the old arid region doctrine it was necessary to hold that beneficial use, both as to volume and periods of time, was the evidence and measure of the right, and hence an irrigator might by conduct limit his right to certain periods of the year. Now, however, under our statute, the grant under the permit of the state engineer or the decree of the court marks the limit of the right." (Emphasis added.)

And in El Paso & R. I. Ry. Co. v. District Court of Fifth Judicial Dist., 1931, 36 N.M. 94, 8 P.2d 1064, it was pointed out why and in what manner New Mexico adjudications differ from those in Colorado. There we said:

"The allegations that petitioners have abandoned their rights or a portion of them, or that some of the use to which they have subjected the waters has been unlawful or wasteful, do not bring this case within those cited. Such issues are proper to be raised in the adjudication suit, where petitioners have submitted

the validity and extent of their right, and where all parties contesting or questioning it may be heard and may have their own rights established.

"It is true that Colorado adjudications are not so sweeping as ours, and that much more is left to the ordinary jurisdiction of equity. The adjudication determines priorities of ditches only. It is confined to the limits of a water district, which does not necessarily embrace a whole stream system. Priorities among consumers from the same ditch, and among appropriators in different districts from the same stream system, must be settled elsewhere. . . .

"Colorado was the leader in statutory state control and adjudication, with twenty-five years of experience before we undertook it. Undoubtedly its statutes and precedents furnished a background for our own legislation. Undoubtedly our adjudication was intended to be more comprehensive. Here stream systems as a whole are to be surveyed. Section 151-118, supra. All rights in the stream system are to be adjudicated. Sections 151-120, 151-122, supra. All claimants are to be parties. Section 151-122, supra. The owners of water rights, not the owners of ditches, are the parties. Snow v. Abalos, supra. In the light of Colorado's experience, we undertook a more thorough job. With North and South Dakota and Oklahoma, we are said to have based our statutes on the draft of Mr. Bean of the Reclamation Service. 2 Weil on Water Rights in the Western States (3d Ed.) p. 1480. Our scheme seems more logical. Whether it is so ambitious as to be impracticable remains to be determined."

It should therefore be plain that the Colorado cases so strongly relied upon by W. S. Ranch, particularly Farmers Highline Canal & R. Co. v. City of Golden, 1954, 129 Colo. 575, 272 P.2d 629, do not involve the same issue that is now before us. There being an adjudication decree, there was no necessity for Kaiser to offer proof of the nature and

extent of the rights sought to be transferred other than as specified by the adjudication decree. Cf., Public Service Company v. Reynolds, 1960, 68 N.M. 54, 358 P.2d 621.

We see nothing in the cases of Durand v. Reynolds, 1965, 75 N.M. 497, 406 P.2d 817; Public Service Company v. Reynolds, supra; Spencer v. Bliss, 1955, 60 N.M. 16, 287 P.2d 221; or Pecos Valley Artesian Conservancy Dist. v. Peters, 1948, 52 N.M. 148, 193 P.2d 418, which is contrary to what we have heretofore said. Thus there was no error in accepting the adjudication decree as proof of the water rights sought to be transferred.

W. S. Ranch argues that the finding, that the transfer would not be detrimental to existing rights, is unsupported by and contrary to the undisputed evidence. There was testimony that, as to at least 40 acres, there had been no water applied to the land for one, or perhaps two, years prior to the hearing before the state engineer. However, other than this testimony, there was no showing of any abandonment or forfeiture, nor was any particular reason given why the "existing right" should have been considered to be impaired. Cf., Cross v. Erickson, 1963, 72 N.M. 73, 380 P.2d 520. The year or years in question were particularly dry ones, and if there is no water available, the owner of the water right is not to be penalized. Section 75-5-26, N.M.S.A. 1953; and New Mexico Products Co. v. New Mexico Power Co., 1937, 42 N.M. 311, 77 P.2d 634. Although, of course, from this and other evidence a fact-finder might have determined that the change would be detrimental to existing rights, there is substantial evidence to the contrary. The engineer's ultimate finding of no detriment is based, in part at least, on the testimony of two former New Mexico state engineers. Although not intending to imply that the testimony of these individuals is entitled to any greater credence or weight than the expert

who testified to the contrary, nevertheless the testimony is certainly not such as should be ignored. This testimony and the other evidence in the record amply sustains the engineer's finding. Clodfelter v. Reynolds, 1961, 68 N.M. 61, 358 P.2d 626:

> "... However, the State Engineer is a highly qualified, able and competent engineer, acquainted with water problems. He heard the evidence and found that the diversion proposed in appellee's application will not impair the rights of any of appellants, or any other existing rights to the use of public waters. The district court also found that no prior existing rights will be impaired by the pumping of the proposed well. This was a controverted issue in the case...."

Allied to the above contention is the claim that the order permits Kaiser to make an extended use of the water right and amounts to a new appropriation. This argument is based upon the proposition that the Vermejo River is a "losing" stream and that there is more water available at the new place of diversion than at the old; that because of this, Kaiser is really obtaining a new appropriation for the additional water, but with the original priority date. This argument is at first blush plausible, because it was agreed by the expert witnesses that during most years there were times when there was insufficient water available to satisfy upstream rights which had a priority higher than those of the 163.4 acres. Nevertheless, the fallacy of the argument is apparent—Kaiser is only entitled to the amount of water that would be available at the old point of diversion as provided in the adjudication decree—it can take no more. Such is the position taken both by Kaiser and the state engineer, and in view of this concession by them, we see no reason to disagree. But as long as a decree remains in effect, Kaiser is entitled to take the amount of water adjudicated to this right, if, but only if, it can do so without detriment to the

rights of other water users on the stream. In this connection, we recognize that changing the place of diversion cannot enlarge or expand the water right at the expense of other appropriators or the state. Cf., Millheiser v. Long, 1900, 10 N.M. 99, 61 Pac. 111; and Hagerman Irrigation Co. v. McMurry, 1911, 16 N.M. 172, 113 Pac. 823. On the other hand, it is not analogous to Kelly v. Carlsbad Irrigation District, 1966, 76 N.M. 466, 415 P.2d 849, which was an application to change a point of diversion from surface to underground waters, where the surface flow had lost its identity as surface water.

We acknowledge that users of irrigation waters have a preference for a diversion point as high up on the stream system as possible, and we are not unmindful that, in irrigation practice, a higher diversion point is frequently preferred to a higher downstream priority. There would seem to be little question but that, pragmatically, these considerations may very well have prompted the protest to the instant proposed change in point of diversion.

To this end, W. S. Ranch urges that although the state engineer imposed certain conditions in conjunction with the granting of the change of point of diversion, the imposition of these conditions does not avail or prevent the detrimental effects of the transfer. Briefly, the conditions imposed limit the total annual amount of water which can be diverted, require the measurement and recording of water diversions and the return flow, protect certain junior appropriators, and, finally, state that the diversion shall not be exercised to the detriment of others. The whole argument on this point assumes that the transfer is detrimental to existing rights; but, conversely, if there is no detriment, we fail to understand how the conditions imposed do anything except give W. S. Ranch added assurance that its water rights will be protected. Theoretically, at least, the state

engineer, having determined that the transfer could be made without detriment to existing rights, could have stopped there and imposed no conditions. However, as a part of his duties in protecting and supervising the public waters of New Mexico, he imposed the conditions mentioned. Cf., City of Albuquerque v. Reynolds, 1962, 71 N.M. 428, 379 P.2d 73. Whether or not any conditions were imposed has no effect whatsoever on the right to damages which may or may not accrue to any other appropriator. Compare, Tevis v. McCrary, 1963, 72 N.M. 134, 381 P.2d 208. The conditions do, however, have the wholesome advantage of providing for a more adequate record than formerly existed.

We have made no mention of the action of the district court in approving the findings of the state engineer. The decision of that court was on the basis of the record before the engineer, and was fully in accordance with our decisions relating to review of the engineer's decisions. See, e.g., Durand v. Reynolds, supra, and discussion therein. Therefore, there is no reason to lengthen this opinion by reviewing the actions of the trial court.

In any event, the points on appeal are without merit and the judgment of the district court affirming the state engineer's action in granting the change of point of diversion to Kaiser Steel is affirmed. IT IS SO ORDERED.

s/ David W. Carmody
Justice

WE CONCUR:

s/ M. E. Noble J.

s/ J. C. Compton J.

Issued: March 18, 1968.